

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 IN RE: INCRETIN-BASED
11 THERAPIES PRODUCTS
12 LIABILITY LITIGATION

13 CASE NO. 13md2452-AJB (MDD)
14 ORDER ON DISCOVERY
15 DISPUTE REGARDING FACT
16 SHEETS
17 (ECF NO. 226)

18 On December 19, 2013, the parties filed an Amended Joint
19 Submission Regarding Plaintiffs' And Defendants' Fact Sheets (ECF No.
20 226). In the submission, the parties bring before the Court two disputes:
21 1. Plaintiffs seek relief from the requirement that they provide a
22 detailed Plaintiff's Fact Sheet in every case filed in this Multi-District
23 Litigation and any related case in this Court; and 2. A dispute regarding
24 a proposed Defendant's Fact Sheet. Plaintiffs' obligation to file Fact
25 Sheets has been stayed pending resolution of this dispute. (ECF No.
26 200).

27 1. Plaintiff's Fact Sheet

28 The Plaintiff's Fact Sheet ("PFS") was the product of negotiations
29 between the parties with some assistance from the Court. The parties
30 filed a Joint Motion Submitting Plaintiff Fact Sheet on May 3, 2013
31 which was implemented by Order of the Court on June 17, 2013, in one of

1 the early filed cases. *Scott v. Merck & Co., Inc., et al.*, 12cv2549, ECF
2 Nos. 31, 33. It was expressly intended to apply to all related cases filed
3 in this District. (*Id.*)

4 Plaintiffs assert that the PFS has proven to be unduly burdensome
5 and propose a “Short Form Plaintiff Fact Sheet” be used in its place.
6 Plaintiffs suggest that the Short Form is sufficient for the parties to use
7 in determining appropriate cases for in-depth discovery as potential
8 bellweather trials. The original PFS, they agree, can be completed in the
9 cases selected for in-depth treatment.

10 Defendants assert that the original PFS is essential in evaluating
11 the cases for bellweather treatment. In particular, Defendants state that
12 the PFS was intended to obviate the need for protracted written
13 discovery directed to each Plaintiff and that the information requested is
14 required as early as possible considering the disease at issue here,
15 pancreatic cancer, often is terminal. According to Defendants, the Short
16 Form proposed by Plaintiffs is insufficient for their needs.

17 The Court finds good cause lacking to modify the negotiated PFS.
18 The process of negotiating the PFS was protracted, involved the same
19 experienced counsel for both sides and some guidance from the Court. To
20 the extent that the real issue concerns the deficiency notices issued by
21 Defendants after review of a PFS, the Order implementing the PFS has a
22 detailed dispute procedure. The parties are welcome to discuss that
23 between themselves and, if no agreement can be reached to modify that
24 aspect of the Order, can bring the matter before the Court. As it now
25 stands, however, the dispute before the Court only regards whether to
26 institute a Short Form PFS in place of the original PFS reserving the use
27 of the original PFS for cases selected for in-depth discovery and
28 bellweather trials. On that issue, the Court finds for Defendants.

1 2. Defendant's Fact Sheet

2 Also before the Court is a dispute over a proposed Defendant's Fact
3 Sheet ("DFS"). It appears that Defendants are not adverse to providing a
4 DFS; the dispute is over timing and the scope of the DFS.

5 Defendants assert that the DFS is not intended as a counterpart to
6 the PFS. The PFS likely is the only early discovery to be provided by the
7 individual Plaintiffs unless and until their cases are selected for more
8 detailed review. Defendants state that they are providing substantial
9 discovery to Plaintiffs; the DFS only serves as a supplement. Defendants
10 assert that the DFS should be focused on information regarding specific
11 Plaintiffs and should not encompass generic discovery being handled
12 through more traditional avenues.

13 The Court agrees with the Defendants regarding the nature and
14 scope of the DFS. Unfortunately, that does not settle the matter. For
15 that, the Court must consider each disputed item.

16 First, however, there is the question of timing. The motion leaves
17 open the issue regarding whether the DFS is to be provided in all cases
18 or only in cases selected for more detailed treatment. A third alternative
19 is for the DFS to be two-tiered: provide basic information in a DFS to be
20 provided in all cases followed by a more detailed exposition for cases
21 selected for detailed review. Essentially, this is what the Plaintiffs were
22 looking for with a short form PFS. The question is whether this
23 approach, rejected by the Court in the PFS context, works for the DFS.
24 The Court finds that the parties should address that issue and decide for
25 themselves. The Court will provide some guidance in ruling on the
26 disputed items below.

27 A. Sources of Information

28 The first dispute concerns whether Defendants must search beyond

1 their reasonably accessible databases into custodial files maintained by
2 individual sales representatives to complete the DFS. Defendants assert
3 that this level of search is unduly burdensome at this stage of the
4 litigation. Defendants appear agreeable to providing a DFS in all cases if
5 their search for information is limited to their databases and also appear
6 agreeable to providing results from a search of custodial files for cases
7 selected for more detailed review.

8 The Court finds that if the parties agree that a DFS is necessary
9 early in the case, that Defendants need produce responsive information
10 from its readily accessible databases. Defendants must search and
11 provide responsive information from custodial files only in cases selected
12 for detailed review. The parties may choose to agree that the detailed
13 DFS is all that is necessary and only in cases selected for detailed review.
14

15 B. Relevant Time Period

16 Plaintiffs want the time period for DFS information to start from
17 the date of FDA approval of the medication and end with the due date of
18 the PFS for each Plaintiff. Defendants want the time period to run from
19 the date of the launch of each medication to the end date of each
20 Plaintiff's prescription period for each product, as determined from
21 Plaintiff's prescription records.

22 Plaintiffs want the longer period just in case there may some
23 relevant information available prior to product launch and after each
24 lawsuit was filed. Defendants want more certainty regarding the time
25 periods covered and want to rely on prescription records to identify when
26 each Plaintiff was provided the subject medication.

27 This "dispute" should have been resolved by the parties. Having
28 thrown up their hands and left it to the Court, the Court finds

1 Defendants' position to be more reasonable.

2 C. Plaintiff-Specific Advertising

3 Plaintiffs want Defendants to determine whether they advertised
4 their medications in the "media market" in which each Plaintiff lived at
5 the time the Plaintiff used a subject medication (apart from national
6 advertising). Defendants assert that this sort of discovery is best
7 handled generally and not by using a Plaintiff-by-Plaintiff approach.

8 The Court agrees with Defendant that this sort of discovery is best
9 handled on an MDL-wide approach and not case-by-case.

10 D. Document Requests

11 In connection with the DFS, Plaintiffs request the production of a
12 variety of documents. Defendants object that Plaintiffs do need require
13 this information with every DFS. There are six categories of documents
14 at issue. (See ECF No. 226 at 10). Two of the requests are easy to
15 dispose of: Request number 10, seeking copies of advertisements, outside
16 of national advertising campaigns, directed toward the media market
17 containing the Plaintiff, properly should be handled in the context of
18 general discovery. Otherwise, Defendants may be required repeatedly to
19 produce to the same materials for Plaintiffs residing in the same general
20 geographic area. Request number 11 also fails as not identifying any
21 particular information - it is a catchall provision which the Court cannot
22 endorse or effectively enforce.

23 Requests 7 and 8 relate to communications with Plaintiff's health
24 care providers about the product, not about the Plaintiff. Those requests
25 similarly should be part of general discovery regarding Defendants
26 communications with health care providers.

27 Requests 6 and 9 concern communications regarding the particular
28 Plaintiffs. Those communications certainly may be relevant. To the

1 extent that Defendants' databases reflect such communications, they
2 must be produced with the DFS. For cases selected for in-depth
3 discovery, such communications as may exist in custodial files must also
4 be produced.

Conclusion

Plaintiffs' motion to modify the PFS process is **DENIED**. The stay granted to Plaintiffs in submitting a PFS for cases filed after November 25, 2013, is hereby lifted. Inasmuch as the stay lasted approximately thirty days, Plaintiffs are accorded an extra thirty days in each case filed after November 25, 2013, and the date of this Order, to submit the PFS to Defendants. The parties may, if they choose, agree to a different schedule and may submit a proposed Order to that effect to the Court.

13 //

14 //

15 //

16 //

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 Regarding the DFS disputes, the Court finds that Defendants may
2 rely solely on database searches to complete the DFS if the DFS is
3 required in every case. If the DFS only is required for cases selected for
4 in-depth review, Defendants must also search relevant custodial files.
5 The parties may agree on a two-tiered process. If the parties cannot
6 agree, they may submit that specific dispute to the Court for resolution.

7 Regarding the specific disputes, the Court finds that the relevant
8 time period is product launch through the end of the prescribed period of
9 use, advertising should be addressed in general discovery, not in the
10 DFS, and that Defendants need only produce documents reflecting
11 communications with or about specific Plaintiffs from their databases, if
12 the DFS is required in every case, or from all sources for cases selected
13 for in-depth treatment.

14

15 IT IS SO ORDERED.

16 DATED: December 27, 2013


Hon. Mitchell D. Dembin
U.S. Magistrate Judge

19

20

21

22

23

24

25

26

27

28